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April 26, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Reply Comments of National Hockey League
in PP Docket No. 93-21

Dear Mr. Caton:

On behalf of my client, the National Hockey League, I am filing with your office an original and nine copies of the Reply Comments of the National Hockey League in the Commission's Further Notice of Inquiry in PP Docket No. 93-21.

Should you have any questions concerning the above, please communicate directly with the undersigned.

Sincerely,

Philip R. Hochberg

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992	)	PP Docket No. 93-21
Inquiry into Sports Programming Migration	)	

REPLY COMMENTS OF
THE NATIONAL HOCKEY LEAGUE

The National Hockey League ("NHL" or "League") submits these Reply Comments to address certain points made by other participants in this proceeding. The record developed in response to the Commission's two Notices of Inquiry admits of only one conclusion, namely, that there is no problem of "migration" of sports programming. Rather, cable television has provided a delivery system for sports, like NHL hockey, that have been unable to obtain exposure on a broadcast network, and has responded to the increasing demand of fans for sports programming of all kinds. This was the conclusion reached by the Commission last year. It remains correct and should be reaffirmed in the Final Report.

The submissions received by the Commission discuss a variety of issues, but plainly support the following findings:

1. There has been no migration of NHL programming from broadcast to cable television. Instead, NHL programming on broadcast television has increased both locally and nationally, and the League's national cable package with ESPN has made games available nationally that would otherwise have been available only locally or regionally. (Affiliated Regional Communications at 12 & n.4; Capital Cities/ABC at 8; ESPN, Inc. at 4; Time Warner Entertainment at 3.)

2. The use of cable television by NHL teams, particularly in some of the more publicized cases, is the result of the inability of NHL Clubs to obtain over-the-air exposure. (Madison Square Garden at 3-4.)

3. The use of pay-per-view is limited, decreasing, and has had the effect of making games available that would otherwise have not been shown. In no instance does the use of pay-per-view represent "migration." (Affiliated Regional Communications at 12 & n.4; Rainbow Programming Holdings at 4-5.)

Based on this record, the Commission would have no basis on which to recommend either legislative or regulatory action to curtail sports programming on cable television. The Commission should resist any effort to the contrary.

Only the Association of Independent Television Stations ("INTV") suggests that regulation is either necessary or legally permissible. INTV does not recommend regulation based on any data relating to NHL telecasts; instead, its focus is overwhelmingly on college football. While we do not propose to comment on whether there has been migration of college football programming, the fact remains that the kind of comprehensive regulatory scheme urged by INTV cannot be justified based on the limited showing INTV makes. INTV's proposal plainly smacks of regulatory overkill, and would effect sweeping changes in the way all sports programmers do business.

In any case, as INTV is forced to acknowledge, its case is entirely dependent on the Commission accepting INTV's revised -- and strained -- definition of migration. INTV asks the Commission to assume that alternatives to broadcast television do not exist, an assumption so artificial as to render the remainder of INTV's analysis meaningless. But even if INTV were to be indulged in its assumption, it does not follow that programming would necessarily "migrate" back to broadcast television. To the contrary -- as the Commission specifically found with respect to professional hockey -- the absence of non-broadcast options would result in a sharp reduction in some programming, and a nearly-complete loss of any national exposure. While INTV's approach would shield its members from competition, it would do little or nothing to promote the interests of fans and consumers.

INTV's proposed remedy -- the reimposition of sports siphoning rules -- is both economically unnecessary and fails to pass constitutional muster. A regulatory scheme of the sort proposed by INTV is hardly consistent with the sort of narrowly tailored "time, place, and manner" restrictions upheld in United States v. O'Brien, 391 U.S. 367 (1968). INTV's cursory analysis of the O'Brien decision does not offer any reason to assume that a court would hold that broad-scale anti-siphoning rules such as those urged by INTV are constitutional. O'Brien predated the Court of Appeals' decision in HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977), by nearly ten years, and the legal basis for "time, place, and manner" rules were well known to the D.C. Circuit. Nonetheless, the court found the Commission's rules unconstitutional.

We respectfully submit that the Commission should (1) confirm the conclusion in its Interim Report that there has been no meaningful migration of sports programming, both generally and with respect specifically to the NHL; (2) reject INTV's call for the reimposition of "anti-siphoning" rules: (3) decline to recommend any legislative action with respect to sports programming, including with respect to any modification or repeal of the Sports Broadcasting Act; and (4) close this proceeding upon issuance of its Final Report.

Respectfully submitted,

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Dated: April 26, 1994